

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 79 OF 2019

PNM.....APPLICANT

VERSUS

JK.....RESPONDENT

(Being an appeal from the Judgment of the Hon. Terer F. (Mr) Resident Magistrate at the

Chief Magistrate's Court Milimani Law Courts Nairobi Children's Case No. 717 of 2017

delivered on 14th June 2019).

RULING

1. Under **Order 42 rule 6(2)** of the **Civil Procedure Rules**, an applicant who is seeking the stay of execution of a decree or order pending the hearing and determination of an appeal that he has preferred has to satisfy the court that he will suffer substantial loss if stay is not granted; that the application has been made without unreasonable delay; and that he has provided such security for the due performance of such decree or order that may ultimately be binding on him (**James Wangalwa & Another –v- Agnes Naliaka Cheseto [2017]eKLR**).

2. In exercising its discretion to order or not to order stay, the court will be mindful that there are two competing interests. The applicant has appealed against the lower court's decision, in the exercise of his undoubted right of appeal. He should not suffer, if stay is not granted, the prospect of his appeal being rendered nugatory. On the other hand, the respondent has a decree that she wants satisfied (**Shell Ltd –v- Kibiru and Another [1986] KLR 410**).

3. Lastly, the appeal relates to the maintenance and upkeep of two minors whose parents are the applicant and the respondent. Under **Article 53(2)** of the Constitution and **section 4(2)** of the **Children Act (Cap 141)**, the Court should bear in mind that the best interests of the children are of paramount importance (**M.N. –v- P.A.S. [2015] eKLR**).

4. The facts of this application are that the two minors (both being under 10 years) were the children born between the applicant (as father) and the respondent (as mother). The respondent sued the applicant at the Children Court at Nairobi seeking their actual custody, care and control; joint legal custody; and for the applicant to be ordered to provide for the minors. The applicant filed a defence and counterclaim. The court heard the dispute and gave judgment on 16th June 2019 giving the parties joint legal custody; care and control to the respondent with access rights to the applicant; and ordered shared parent responsibility. The applicant was ordered to provide the school fees and related expenses, medical and monthly maintenance of Kshs.25,000/=. The respondent was ordered to provide rent, clothing, pay for utilities and other expenses. The applicant was aggrieved by the decision, and on 10th July 2019 filed an appeal. His major complaint was that the court had failed to consider his financial ability and had consequently failed to apportion parental responsibility equally, and/or appropriately. On 30th September 2019 he filed the present application seeking the stay of the orders of the lower court until the appeal has been heard and determined.

5. It is common ground that, since the orders were made, he has not been paying the said Kshs.25,000/=. The outstanding amount is in excess of Kshs.350,000/=. The applicant states that he cannot afford the ordered Kshs.25,000/=; that his means are such that he can only afford Kshs.10,000/= monthly. He has not, since the judgment, been paying that Kshs.10,000/=. He is seeking the exercise of the court's discretion. Such discretion cannot be exercised in his favour if he is in such default, and has not made effort to deposit even the Kshs.10,000/= into court monthly, if the respondent did not accept that lesser figure (**M.N. –v- T.A. N. and Another [2015]eKLR**). Court orders are not made in vain. They are made to be obeyed. The respondent was under obligation to abide by the orders of the lower court until stayed, varied, reviewed or set aside.

6. As to whether he will suffer substantial loss if stay is not granted, it is important to consider that the court is dealing not only with the interests of the parents but also the best interests of the two minors which cannot be postponed. The minors have a constitutional and statutory right to be maintained on an on-going basis.

7. In short, on the material placed before me, I do not consider that the applicant has made a case for the stay of the orders of the lower court while the appeal is pending hearing and disposal. I dismiss the application with costs.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 7TH day of MAY 2020

A.O. MUCHELULE

JUDGE